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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 93

MARGARET B. CARPENTER and L. E. CARPENTER, also known as LEROY E. CARPENTER,

Petitioners,

vs.

ARCHIBALD J. HAMILTON,

Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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IN THE

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October Term, 1939
No. 1031

MARGARET B. CARPENTER and L. E. CARPENTER, also known as LEROY E. CARPENTER,

Petitioners,

vs.

ARCHIBALD J. HAMILTON,

Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

I.

Casual Statements of Respondent's Preliminary Outline of the Case Are Misleading as to the Facts.

1.

The proceeding in the California courts, with respect to which the petitioners seek certiorari, is not a "mortgage foreclosure" suit, as asserted in respondent's brief (Resp. Br. p. 1). It is a suit in equity for the foreclosure of a deed of trust. The distinction is pertinent to the federal question,—as to whether there was a denial of due process in equity—and whether judgment for the sale of the petitioners' property was rendered without a hearing, for the reason that, whereas a mortgage MUST

be foreclosed by action in equity, there is a choice of procedure, under California law, to foreclose a trust deed.

California Code of Civil Procedure, Secs. 726, 725a, 692, 694;

California Civil Code, Sec. 2924.

When the state court, sitting in equity, ordered the home of the petitioners to be sold, without, in effect, affording the petitioners a hearing, by foreclosing all inquiry into the alleged unconscionable conduct of the respondent, it did so in a proceeding which the respondent had himself selected, since there was available to him the alternative procedure at law of sale under the terms of the trust deed.

2.

The respondent (Resp. Br. pp. 2, 3) fails to mention that the "judgment against the petitioners", in the former action for damages for fraud, was a "judgment notwithstanding the verdict" restricted to the issue of negligence on the part of petitioners only. The facts once determined by the jury, that the allegations as to the respondent's misrepresentations were true, were *not* reexamined or reversed by the judgment of the District Court of Appeal [Rec. pp. 38-45].

Indeed, the reversal of the jury judgment rendered in favor of the petitioners was achieved by most unusual procedure under Sec. 629 of the California Code of Civil Procedure, which was repealed almost simultaneously with the entry of said reversal of jury judgment (March, 1937). We know of no other case in which a judgment notwithstanding the verdict was entered AGAINST THE PLAINTIFF without an appeal by both litigants, after an order for a new trial as to all the issues had been granted

by the trial court and while both parties were in the same position as if no trial had occurred.

The above facts are pertinent to this petition for writ of certiorari, in that the "whole evidence" (Art. VI, Sec. 4½, Constitution of the State of California) was not before the District Court of Appeal in the former fraud action, and that court did not adjudicate any issue except that of alleged negligence on the part of the petitioners [Opinion of the District Court of Appeal, Rec. pp. 38-45]. Said court was, in fact, prohibited from re-examining or readjudicating the facts of the respondent's misrepresentations, once determined by the jury in favor of the petitioners here.

California Code of Civil Procedure, Secs. 592, 2101, 608, 1847, 956a;

Constitution of California, Art. I, Sec. 7, and Art. VI, Sec. 4½;

California Civil Code, Secs. 1574, 3442.

This court has decided that the only modes known to common law to "reexamine" facts once tried by a jury are the granting of a new trial by the court where the issue was tried, or to which the issue was properly returnable, or by the award of a venire *facias de novo* for some error of law which intervened in the proceedings. (Jurisdiction of the Supreme Court, p. 186, Sec. 102, Robertson and Kirkham.)

3.

The effect of the respondent's claim is that on the assumption that no appeal was taken from the judgment notwithstanding the verdict in the former fraud action, he was therefore free to come into equity as an actor, of his own choice, with the court of equity thereafter for-

ever enjoined from inquiry into matters purely equitable arising out of the same transaction; with the petitioners forever silenced from defending their inalienable rights, privileges, and immunities in respect to their home, as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and with judgment for the sale of the petitioners' property predetermined in his favor before ever the action in equity was begun.

The California law preserved to the petitioners their equitable rights (California Civil Code, Sec. 3343; California Code of Civil Procedure, Sec. 1050), and also preserved to them, as plaintiffs who had had a JURY judgment in their favor in the former fraud action reversed on appeal, the right to bring a new action within a year from the reversal (California Code of Civil Procedure, Secs. 355, 1047). The judgment notwithstanding the verdict was entered March 2, 1937 [Rec. p. 27]. Within the year, October 25, 1937 [Rec. p. 7], petitioners filed a separate affirmative defense in answer to respondent's self-elected procedure in equity to foreclose the deed of trust and set forth therein additional facts and matters purely equitable arising out of the transaction not theretofore pleaded, or in issue, or adjudicated. Said separate affirmative defense [Rec. pp. 10-17] was a clear intendment by the petitioners to invoke full inquiry into the "clean hands" of the suitor in equity, before judgment should be rendered in respect to the sale of petitioners' home.

Moreover:

> "The equitable principles of 'clean hands' and 'inequity' are not remedies, but are rather self-imposed jurisdictional limitations of a court of equity. They constitute prerequisites that a plaintiff in equity must admit, provide for and secure, as a condition to equity affording him relief."
>
> 1 *Pomeroy's Equity Jurisprudence* (4th ed), paragraphs 388, 397;
>
> *Cf. Olmstead v. United States, infra.*

II.

Petitioners' Answer to Points I and II of Respondent's Argument.

Application of the doctrine, "He Who Seeks Equity Must Do Equity", is the very essence of due process in equity and is inseparable from the Federal concept of due process embodied in and guaranteed by the Fourteenth Amendment to the Constitution of the United States.

To abrogate the doctrine of "clean hands" clearly transcends questions of purely local law and constitutes an offense against the very "conscience" and structure of the law which finds its roots in the federal Constitution; moreover due process in equity clearly requires that, whether or not a claim is asserted by either party, every court, state as well as federal, of its own motion, is in duty bound to make independent inquiry into facts indicating "uncleanliness" of the plaintiff in equity and to bar from its doors the guilty suitor.

It follows that the court of equity below was not, and could not have been, estopped from applying the fundamental principle of equitable due process by the prior judgment of a court of law, as respondent claims, for not until the equitable action was instituted and not until the respondent sought the aid of a court of equity did the exclusively equitable issue of "clean hands" in equity arise.

Petitioners submit that when the state court, sitting in equity, refused to make inquiry into the petitioners' allegations concerning the unconscionable conduct of the respondent, said court broke faith with the source of its own jurisdiction and *rendered a judgment which deprived the petitioners of their home without that due process of the Fourteenth Amendment, which the fundamental rule of equity required the court to grant of its own motion.*

There is no state rule in California and no requirement of particular words for "drawing into question" the claim of a federal right. "Fair precision" and "clear intendment" is all that is required. *The substantive right of due process in equity, was claimed by the petitioners both in the separate affirmative defense in their answer to the complaint* [Rec. pp. 10-17] *and at the trial; and each and every right of the petitioners was especially preserved to them by the express stipulation of the respondent at the trial* [Rec. pp. 27, 28, fols. 45-48].

The petitioners' proffer of proof [Rec. pp. 27, 28, fols. 45-48] at the trial, by reason of the respondent's stipulation that there would be no question thereafter as to form of the offer of proof, nor claim that the proffer was lacking, and that it was to be the best proffer of proof that could be made, was "clearly intended", in sub-

stance and effect, to be the best and most all-embracing preservation to the petitioners that could be made of their claim to each and all of their inalienable rights, privileges, and immunities under the Federal Constitution. It constituted, in substance and effect, an assertion of a claim to federal due process.

Furthermore, although the ruling was adverse and evasive, the highest state court [Rec. pp. 46-49] took cognizance of the fact that the petitioners intended to, and did place before said court, the question as to whether there had been due process in equity [Rec. p. 48]; as to whether the doctrine of "clean hands" had been applied; and whether independent hearing and inquiry into matters and facts purely equitable had been granted by the trial court of equity before judgment was rendered in respect to the sale of their property. The Supreme Court of California, itself, sitting as a court "of conscience" and of "clean hands", by its judgment affirmed the denial of a hearing in the trial court upon the issue of "clean hands", and hence denied due process to the petitioners. Inquiry into the "cleanliness" of the suitor in equity is an inviolable rule of equitable procedure and must be self-imposed by the court.

That is the law of California.

> "The rule of clean hands applies only where a party is appealing as an actor to a court of equity in order to obtain some equitable relief, and, under its operation, an equitable right may be secured, or equitable relief awarded to a defendant which could not be obtained for him in any other way."
>
> *Holland v. Hotchkiss,* 162 Cal. 366.

"A court of equity will not allow itself to become a hand-maid of inequity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will of its own motion instigate an inquiry in relation thereto."

Richman v. Bank of Perris, 102 Cal. App. 71.

That is the law of the United States, as well.

Justice Brandeis, in *Olmstead v. U. S.,* 277 U. S. 438, 471, expressed the view:

"The governing principle has long been settled. It is that a court will not redress a wrong when one who invokes its aid has 'unclean hands' . . . The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. The aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. *But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all parties to the litigation. The court protects itself."* (Italics ours.)

Cf. Nardone v. United States, 302 U. S. 379; 308 U. S. 338.

The courts below, accordingly, violated the duty to accord the petitioners their constitutional right, as guaranteed to them by the Fourteenth Amendment, to have a hearing on the vital issue of the "clean hands" of the respondent.

III.

Petitioners' Answer to Points III and IV of Respondent's Argument.

The non-federal ground of *res adjudicata,* as a matter of local law, is not broad enough to sustain said judgment below. It is not independent of the federal right of due process and of the rights, privileges, and immunities in respect to property guaranteed by the Fourteenth Amendment to the Constitution of the United States; it is not independent of the fundamental doctrine, "He Who Seeks Equity Must Do Equity", which by settled law, conditions the exercise of equitable jurisdiction, constitutes equitable due process, and must be applied by the court of its own motion for the sake of the law itself. Such a contention permits a means of legal banditry with the victim forever silenced and bereft of remedy; it is abhorrent to the concept of ordered liberty and justice guaranteed alike by the principles of equity and by Amendment XIV to the federal Constitution; it undermines uniformity of decision, and offends the "conscience" of the law itself. It is a denial of the "rudimentary demands of justice".

Conclusion.

Petitioners submit that, for the reasons heretofore given, a substantial federal question was raised by them in substance and effect and "by clear intendment". Moreover, to apply the fundamental doctrine, "He Who Seeks Equity Must Do Equity", which constitutes due process in equity and which is embodied in and inseparable from the federal concept of due process as provided by Amendment XIV to the Constitution of the United States, was a self-imposed duty upon the courts below, for the sake of the law itself. Not to apply the doctrine was an abridgment of equitable right and denial of due process. The case turns on the question. The issue is of general and public importance. It warrants consideration by this Court in the interests of the rudimentary principles of justice and fairness. It is of importance to the preservation alike of the fundamental principles of equity, and of the rights, privileges, and immunities of the petitioners, and of due process guaranteed by Amendment XIV to the Constitution of the United States.

Respectfully submitted,

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